STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2011
v	No. 297383 Washtenaw Circuit Court
SAMUEL MAXWELL, Defendant-Appellant.	LC No. 06-001674-FH

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant Samuel Maxwell appeals as of right his jury conviction of three counts of third-degree criminal sexual conduct involving force or coercion (CSC III)[1] and one count of assault with intent to commit sexual penetration.[2] The trial court sentenced Maxwell, as a third habitual offender,[3] to concurrent terms of 217 months to 30 years in prison for the CSC III convictions and ten to 20 years for assault with intent to commit sexual penetration. We affirm.

I. FACTS

The complainant in this case was involved in a serious automobile accident in 1997 and suffered a severe head injury. The injury left him in a coma for over a month and resulted in partial paralysis of his left side, as well as minor cognitive difficulties. Despite his paralysis, the complainant learned to walk again through occupational therapy. However, the complainant was not able to drive, and he was not medically cleared to use the public bus system because he would get lost and confused about where he was going. Thus, in order to travel, the complainant used a subsidized cab transportation service for disabled persons, called "A-Ride," which was provided by the Ann Arbor Transportation Authority.

On August 3, 2006, the complainant made plans to go over to his ex-wife's house to pick up his son for a weekend visitation and to deliver money to his ex-wife so that she could

[1] MCL 750.520d(1)(b).

[2] MCL 750.520g(1).

[3] MCL 769.11.

purchase new school clothes for their son. At approximately 2:15 p.m., the pre-arranged cab arrived at the complainant's home and took him to his ex-wife's house. The complainant testified that he scheduled the return cab to arrive approximately an hour later. While they were waiting for the return cab to arrive, the complainant's son told his mother that he was going to visit the neighbor next door. As the time for the return cab drew near, the complainant grew concerned that his son had not yet returned and decided to look for him.

The complainant went to the house next door, only to discover that his son was not there. The complainant then decided to check the local playground where his son had attended daycare. The complainant walked the short distance to the daycare facility and briefly spoke to an employee outside the building. The employee told the complainant that she had not seen his son. According to the complainant, Maxwell then approached him and offered to help him search a nearby park; Maxwell told the complainant that he knew "where kids like to go." The complainant testified that he recognized Maxwell as a man he had seen before at the party store near the daycare facility.

The complainant followed Maxwell into the park, walking down into an area near a small creek. Maxwell kept assuring the complainant that he knew where kids liked to go and that they were on the right path. After crossing a small footbridge over the creek, Maxwell turned, grabbed the complainant's face, and said, "[Y]ou are going to do exactly what I tell you[.]" The complainant testified that he became afraid that Maxwell may try to kill him.

Maxwell pulled off the complainant's jacket, knocking off his glasses; hit him on the side of the head; and knocked him to the ground. Maxwell then pulled off the complainant's shorts and underwear and attempted to sodomize him. After his attempt was unsuccessful, Maxwell then digitally penetrated the complainant's anus. Maxwell then spat on the complainant's anus and continued digitally penetrating him. The complainant testified that he did not try to fight Maxwell because he was scared and Maxwell was stronger than he was. Maxwell then removed his fingers, picked up the complainant, and walked him closer to the footbridge, where he forced the complainant to perform fellatio on him. Maxwell then took the complainant back across the footbridge to a nearby picnic table and told the complainant to get dressed. The complainant testified that he did not try to run away as they were walking toward the picnic table because he was not yet dressed, he could not see well without his glasses, and he was afraid that Maxwell would catch him. After the complainant dressed, Maxwell again forced him to perform fellatio on him. Maxwell eventually ended the encounter, threw the complainant's jacket at him, and then left. The complainant's wallet and money were missing from his jacket pocket.

Despite his poor vision without his glasses, the complainant was able to navigate his way back to his ex-wife's house. When he arrived at the house, his niece called his ex-wife (who had been driving around looking for him) and then the police were called.

Washtenaw County Sheriff's Department Deputy Michelle McDonagh testified that she arrived at the complainant's ex-wife's home while the complainant was still there being tended to by paramedics. She heard the complainant say that he had lost his glasses and wallet, and that he had not been able to get his underwear back on after the assault, so they were under the picnic table. After the complainant left in an ambulance to go to the hospital, the complainant's ex-wife and Deputy McDonagh searched the area where the complainant said that he was assaulted.

However, neither the complainant's ex-wife nor the officer was able to find the complainant's wallet, glasses, or clothing.

At the hospital, a Sexual Assault Nurse Examiner was assigned to perform a post-assault examination. The nurse testified that she did not notice any injuries to the complainant's face. But she admitted that injuries are not always visible when someone is struck by a hand. She also testified that she did not notice any obvious signs of rectal trauma; however, she stated that it is "not unusual" for a person to be assaulted in the rectal area and not display identifiable injuries. She further noted that when a lubricant, like saliva, is used, examiners "usually won't find trauma." While she was examining the complainant, the nurse took DNA swabs from the complainant's mouth and rectum. The nurse also testified that the complainant was wearing underwear when he was admitted to the hospital. The nurse further testified that she did not notice any signs of impairment from alcohol or drugs when she examined the complainant.

Doris Wunderlich testified on behalf of the prosecution. Wunderlich worked for Select Ride, Inc., which was a transportation company that contracted with the Ann Arbor Transportation Authority to provide the A-Ride program. Wunderlich testified that her company's A-Ride records indicated that on August 3, 2006, the complainant used the A-Ride service by pre-scheduling a pick-up at 2:15 p.m., which he used to travel from his residence to his ex-wife's house. According to Wunderlich, the complainant also scheduled a return pick-up from his ex-wife's house; however, the ride was never taken. Wunderlich further testified that A-Ride's records indicated that the complainant later used the service again past midnight to get home from the hospital.

Deputy McDonagh testified that she interviewed Maxwell after he was arrested. Deputy McDonagh testified that Maxwell smelled of intoxicants when she met him; however, she felt that Maxwell's level of intoxication did not preclude her from moving forward with the interview. Maxwell told Deputy McDonagh that earlier that day he had met "a white male" (allegedly, the complainant) on the bus. According to Maxwell, the two men then got off the bus and, after stopping at Maxwell's house, they went to Superior Park, the same park where the complainant alleged that he was assaulted. Maxwell stated that they met up with his friends, Stan and Rick, at the park, and they all sat around, drinking beer. Eventually, Stan and Rick left, after which, according to Maxwell, the complainant attempted to extort money from him to get money for crack cocaine. Maxwell told Deputy McDonagh that the complainant then pulled out his penis and started fondling Maxwell. Maxwell explained that the complainant then attempted to perform fellatio on him. However, Maxwell also told Deputy McDonagh that he "wasn't sure" whether the complainant "did, in fact, suck his penis[.]" Deputy McDonagh testified that Maxwell told her that he and the complainant got into an altercation, in which the complainant pushed Maxwell, and then Maxwell punched the complainant in the chest. According to Maxwell, the encounter ended when the complainant ran away.

Washtenaw County Sheriff's Department Detective Michael Babycz testified regarding a June 2007 interview that he observed between another officer and Maxwell. According to Detective Babycz, Maxwell stated that he and the complainant met a few months before the August 2006 incident. Maxwell explained that he and the complainant developed a working relationship in which the complainant would help Maxwell with home improvements in exchange for money. Maxwell stated that his relationship with the complainant progressed such

that they began regularly spending time together, smoking marijuana and drinking alcohol at Maxwell's house and in the park. According to Maxwell, on August 3, 2006, he and the complainant met in Downtown Ypsilanti and spent the day drinking vodka and riding around on the bus. The two parted ways because the complainant had to visit his son, but the complainant then met Maxwell again only a half hour later at Maxwell's house. Maxwell claimed that, while at his house, the complainant exposed his penis to Maxwell, who touched it. After that, Maxwell and the complainant went to the local party store to purchase more alcohol. While at the store, Maxwell confronted the complainant, accusing him of using cocaine and threatening to tell the complainant's ex-wife about their sexual encounter. According to Maxwell, he struck the complainant on the side of the head, after which the complainant ran away.

The complainant's ex-wife testified at trial that the complainant did not drink alcohol because he did not like it. She clarified that the complainant "couldn't drink [alcohol] even if he wanted to . . . [b]ecause he was on medication." The complainant's ex-wife also testified that, to her knowledge, the complainant did not take illegal drugs or smoke cigarettes. She further testified that when the complainant arrived at her house on August 3, 2006, she did not notice anything about him that would have led her to believe that he was intoxicated or under the influence of drugs.

Additionally, the complainant testified that he never rode a public bus against medical advice. Although he admitted that he had an interest in drugs when he "was a kid," he had never taken any illegal drugs during his adult life. He also admitted that he used to smoke cigarettes, but he quit in 1997. He also testified that he had not had any alcohol since he had his accident in 1997. He explained that he could not mix alcohol with his medications; for example, if he were to drink alcohol with his anti-seizure medication, it could actually trigger a seizure. The complainant's clinical psychologist testified that he had never seen any indications that the complainant was using alcohol or drugs.

Maxwell presented three witnesses at trial—two who testified at trial and a third who was unavailable to testify, so his testimony from a previous trial[4] was read into the current trial record. The first defense witness was Clinton Thomas, a maintenance worker at a nearby apartment complex. Thomas testified that, on August 3, 2006, he saw Maxwell walking around the area at about 8:30 or 9:00 a.m. and then again at about 5:00 p.m. According to Thomas, Maxwell was with a "Caucasian guy," who had "shoulder-length[,]" "sandy brownish" hair. Thomas testified that, after he heard about the incident between Maxwell and the complainant, he "just assumed" that the man with Maxwell that day had been the complainant. He further testified that he had seen the complainant in the past when the complainant came to his ex-wife's house to pick up his son. When asked if the man he saw walking with Maxwell on August 3 was the same man that he had seen going to the complainant's ex-wife's house, Thomas responded, "I can't be 100 percent sure, you know, because I just seen him from the side like." On cross-

[4] This case returns to this Court after in a prior appeal in which a panel of this Court ordered a new trial based on the prejudicial effect caused by Maxwell wearing leg shackles as he approached the witness stand to testify. *People v Maxwell*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 281909).

examination, Thomas admitted that he was "not absolutely sure" that the man he saw with Maxwell was the complainant. Thomas also admitted that he could not even be sure that the day he saw Maxwell walking with the "Caucasian guy" was the same day as the assault. And Thomas admitted that, during the previous trial, he was unable to identify the complainant out of the people in the courtroom.

The second defense witness, Dick Visser, was Maxwell's former landlord and employer. Visser testified that he first saw the complainant when Maxwell had shown him a digital picture that Maxwell said was a picture of "[the complainant], [his] friend from Ann Arbor." Visser testified that he later met the complainant when Maxwell introduced the complainant to him at his house. Visser described the complainant as a 5'7", average-sized, white male, with long, light brown hair and wire-rimmed glasses. On cross-examination, Visser revealed that at the previous trial, he described the complainant as being "about 5'11", 180 pounds, dark hair, glasses[.]" Visser also testified that he was very involved in Maxwell's case and had spent his personal time and financial resources in assisting with Maxwell's defense.

The third, unavailable defense witness, James Hendrickson, was one of Maxwell's friends. During Hendrickson's previous trial testimony, the following exchange occurred:

> *Q.* Now when you were there [at Visser's house] did you ever see a man that was identified to you as [the complainant]?
>
> *A.* No. I've seen this guy but he didn't look anything like he does now.
>
> *Q.* What did he look like?
>
> *A.* Kind of like a drunk dude. He was all—I believe he was laying on the couch. But I really wasn't paying a lot of attention to him . . . .
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> * * *
>
> *Q.* Now how do you know or do you have any way of knowing for sure that that's the same fella that is the complainant against Sam today?
>
> *A.* I've never—I never—this has gone on for so long. I really didn't even know if I was going to recognize him . . . .

Hendrickson also testified that he again saw the same man who had been laying on the couch—whom he identified as the complainant—at the local party store. Hendrickson claimed that the man was "bending over the car like trying to bum money."

After the reading of Hendrickson's testimony into the record was complete, the defense rested its case. The jury found Maxwell guilty of one count of CSC III involving digital penetration, two counts of CSC III involving oral sex, and one count of assault with intent to commit sexual penetration. The jury found Maxwell not guilty on an additional count of CSC III involving oral sex. The trial court sentenced Maxwell to concurrent terms of 217 months to 30 years in prison for each CSC III conviction and 10 to 20 years for assault with intent to commit sexual penetration. Maxwell now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Maxwell argues that the prosecution did not present sufficient evidence to allow the jury to find him guilty beyond a reasonable doubt. In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[5]

B. LEGAL STANDARDS

Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt.[6] However, this Court should not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses.[7] It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences.[8]

C. APPLYING THE STANDARDS

In relatively cursory fashion, Maxwell argues in his brief on appeal that the evidence at trial was not legally sufficient to support his convictions because of "the contradictions in the testimony of the complainant, the variances from the physical facts on the ground, or essentially the lack of any such physical evidence, and the total failure to produce any corroborating evidence[.]" Maxwell points to testimony indicating that the complainant's ex-wife "should have" passed by him while she was driving around looking for him, if, in fact, he was walking home at the time he claimed. Maxwell also points to testimony indicating that every part of the park where the alleged assault took place could be seen from "somewhere the public might normally be expected to be[.]" Maxwell also finds significant that Deputy McDonagh and the complainant's ex-wife were unable to locate his glasses, wallet, or underwear in the park. He also notes that, despite his comment to the contrary, the complainant was wearing underwear when he was admitted to the hospital. Maxwell notes that the complainant did not exhibit any injuries associated with his alleged assault. And, finally, Maxwell relies on the testimony of the three defense witnesses who claimed to have seen the complainant in Maxwell's company.

We first point out that Maxwell's own testimony and his defense witnesses' testimony contained many contradictions. Most notably, his own versions of the events varied significantly between his two interviews. In his first interview, Maxwell said that he and the complainant met up to drink with some friends at the park, after which the complainant attempted to extort money

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[5] *People v Ericksen*, 288 Mich App 192, 196; ___ NW2d ___ (2010).

[6] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

[7] *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

[8] *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

from him for crack cocaine by performing fellatio on him, the men got into an altercation, and then the complainant ran away. In a later interview, Maxwell said that he and the complainant rode around on the bus, drinking vodka, after which they had a brief sexual encounter at Maxwell's house, and then, while at the local party store, the men got into an altercation, and then the complainant ran away. However, testimony from other witnesses revealed that the complainant did not drink alcohol or do drugs because they would cause adverse reactions when mixed with his medications. And the complainant's ex-wife and the examining nurse both testified that the complainant did not appear to be intoxicated or under the influence of drugs on the day of the incident. Also, the complainant testified that he never rode the bus due to his medical restrictions. Further, none of Maxwell's witnesses were sure that the man they each alleged to have seen in Maxwell's company was in fact the complainant.

Regardless, Maxwell fails to provide any rationale why the evidence presented was insufficient to satisfy the elements of the crimes of which he was convicted. As Maxwell concedes, it is the factfinder's role to determine the weight of evidence or the credibility of witnesses.[9] Thus, it was the province of the jury to reconcile the contradictions and assess the weight to be given to each witness's testimony. Moreover, to the extent that Maxwell suggests that the other witnesses' testimony needed to comport with the complainant's recounting of the assault to support Maxwell's convictions, that argument is without merit. MCL 750.520h explicitly states that the testimony of a victim of CSC III or assault with intent to commit sexual penetration "need not be corroborated[.]"

The complainant testified in detail regarding the assault. He testified that Maxwell grabbed his face, told him, "[Y]ou are going to do exactly what I tell you[,]" pulled off his jacket, knocked off his glasses, hit him on the side of head, and knocked him to the ground. The complainant further testified that Maxwell then attempted to sodomize him, but after being unsuccessful in that attempt, digitally penetrated his anus. According to the complainant, Maxwell then forced the complainant to repeatedly perform fellatio on him. Thus, when viewing the evidence de novo in the light most favorable to the prosecutor, we determine that a rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt. Accordingly, we reject Maxwell's insufficiency of the evidence claim.

Additionally, we note, that to the extent that Maxwell argues that the prosecutor engaged in misconduct by shifting the burden of evidence to the defense, we reject that claim as well. Maxwell failed to properly present this argument by not including this issue in his statement of questions presented[10] and by failing to support this contention with any supporting authority.[11] Moreover, his argument is without merit.

Maxwell claims that the prosecutor improperly shifted the burden of proof by stating that the defense was required to prove its theory that the complainant concocted the story of the

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[9] *Passage*, 277 Mich App at 177.

[10] *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

[11] *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

assault to cover up the fact that he lost or misspent the school clothes money. However, the prosecutor explicitly made clear that he was not attempting to shift the burden of proof:

> I'm not talking about shifting burden but I guess I can say it this way. The defense doesn't have to do anything. The burden is entirely mine. However, if the defense decides to put on some sort of a case like calling witnesses or cross-examining my witnesses, and they try and make points by doing those types of things, even though they don't have a burden to do anything, if they do something, judge it. You have a duty to judge what they do if they decide to put on a case and present testimony.

The prosecutor's statements comport with this Court's guidance in *People v Fields*:

> [W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof.[12]

The prosecutor's comments were an acceptable challenge to the validity of Maxwell's theory of the case. "Where . . . a defense theory is explicitly advanced by the defendant, the factfinder is to evaluate the reliability of the claim through traditional means."[13] Moreover, the trial court instructed the jury, both before opening statements and after closing arguments, that Maxwell bore no burden "to prove his innocence or do anything."[14] Thus, there is no merit to Maxwell's claim of prosecutorial misconduct.

III. MAXWELL'S STANDARD 4 BRIEF

Maxwell raises several additional issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. PROSECUTORIAL MISCONDUCT

1. STANDARD OF REVIEW

Maxwell argues that he was denied his state and federal rights to a fair trial because the prosecutor failed to turn over exculpatory evidence (DNA test results) to the defense. This Court reviews claims of prosecutorial misconduct case by case to determine whether the defendant received a fair and impartial trial.[15] Where, as here, a defendant fails to object to an alleged

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[12] *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

[13] *Id.* at 118.

[14] See *id.* at 116 n 26.

[15] *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

prosecutorial impropriety, to avoid forfeiture of the issue, the defendant must demonstrate plain error that affected his substantial rights—that is, that affected the outcome of the proceedings.[16]

2. LEGAL STANDARDS

> "Under the Due Process Clause of the Fourteenth Amendment,[17] criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.' *United States v Valenzuela-Bernal*, 458 US 858, 867 [102 S Ct 3440; 73 L Ed 2d 1193] (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system."[18]

Further, under *Brady v Maryland*,[19] "[d]efendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment."[20] "Exculpatory" evidence is evidence that would raise a reasonable doubt about the defendant's guilt.[21]

3. APPLYING THE STANDARDS

The record is devoid of any evidence that the swabs taken from the complainant's mouth or rectum were ever tested. The examining nurse testified that, after she took the swabs, they were sent to the state police crime lab; however, she never received results of any DNA testing. Thus, because the record does not reveal, and Maxwell does not argue, that the examination swabs were ever actually tested, his argument that the prosecution's failure to hand over the DNA test results was a *Brady* violation is without merit. The prosecution could not turn over evidence that it did not itself possess. And Maxwell's argument that any possible DNA results must have been favorable to his defense is mere speculation.

Further, the Michigan Supreme Court has made clear that the police have no constitutional duty to assist a defendant in developing potentially exculpatory evidence; that is,

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[16] *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

[17] See also Const 1963, art 1, §§ 13, 17, 20; *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984).

[18] *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006), quoting *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984).

[19] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

[20] *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady*, 373 US at 87.

[21] *Id.*

the police have no constitutional duty to perform any particular tests.[22] "For due process purposes, there is a crucial distinction between failing to disclose evidence that has been developed and failing to develop evidence in the first instance."[23] Indeed, as this Court has stated:

> When the police fail to run any tests, the lack of evidence will tend to injure their case more than [the] defendant's since the prosecution has the burden of proving guilt beyond a reasonable doubt. Whether or not to run . . . tests is a legitimate police investigative decision.[24]

Absent any evidence to the contrary, because this case involves the failure to develop evidence, as opposed to the failure to disclose existing evidence, we conclude that Maxwell has not demonstrated plain error that affected his substantial rights and, accordingly, his rights were not violated.

B. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

1. STANDARD OF REVIEW

Maxwell argues that he was denied his state and federal rights to the effective assistance of trial counsel because trial counsel failed to demand the DNA test results. Because it is unpreserved, we consider Maxwell's claim only to the extent that defense counsel's claimed mistakes are apparent on the record.[25]

2. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.[26] To prove that his defense counsel was not effective, a defendant bears the burden to show (1) that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that defense counsel's deficient performance so prejudiced the defendant that it deprived him of a fair trial; that is, but for defense counsel's errors, the result of the proceeding would have been

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[22] *Anstey*, 476 Mich at 461, citing *In re Martin*, 374 P2d 801, 803 (Cal 1962) ("[P]olice officers are not required to take the initiative or even to assist in procuring evidence on behalf of a defendant which is deemed necessary to his defense[.]") and *People v Finnegan*, 647 NE2d 758, 761 (NY App 1995) ("[P]olice have no affirmative duty to gather or help gather evidence for an accused[.]").

[23] *Anstey*, 476 Mich at 461.

[24] *People v Stephens*, 58 Mich App 701, 705-706; 228 NW2d 527 (1975).

[25] *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[26] US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

different.[27] In proving these elements, the defendant must overcome a strong presumption that defense counsel's performance constituted sound trial strategy.[28] This Court evaluates defense counsel's performance from defense counsel's perspective at the time of the alleged error and in light of the circumstances.[29] This Court may not second-guess defense counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight.[30]

3. APPLYING THE STANDARDS

As we have stated, there is no evidence establishing that DNA testing was performed or that DNA test results exist in this case. In the absence of such evidence, Maxwell cannot show that defense counsel provided constitutionally-deficient representation by depriving him of exculpatory evidence. And, again, because the police have no constitutional duty to assist a defendant in developing potentially exculpatory evidence,[31] defense counsel was not constitutionally-deficient by failing to request that the DNA tests be performed. Therefore, Maxwell's claim of ineffective assistance of trial counsel fails.

C. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Maxwell argues that he was denied his state and federal rights to the effective assistance of appellate counsel because his appellate counsel filed a frivolous brief by failing to raise Maxwell's DNA test result issues.

1. LEGAL STANDARDS

A criminal defendant's rights to appeal and to counsel on appeal include the right to effective assistance of counsel on appeal.[32] As with trial counsel, to establish a claim of ineffective assistance of appellate counsel, a defendant must show that appellate counsel's performance was deficient under an objective standard of reasonableness and that the deficiency prejudiced the defendant.[33] Appellate counsel may legitimately ignore weak or frivolous

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[27] *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[28] *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).

[29] *Strickland*, 466 US at 689.

[30] *People v Rice* (*After Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999).

[31] *Anstey*, 476 Mich at 461.

[32] *People v Pauli*, 138 Mich App 530, 534; 361 NW2d 359 (1984).

[33] *People v Uphaus* (*On Remand*), 278 Mich App 174, 186; 748 NW2d 899 (2008).

arguments in order to focus on genuine arguments that are more likely to succeed.[34] The defendant must overcome the presumption that the challenged action was sound strategy.[35]

2. APPLYING THE STANDARDS

Here, the DNA-result issues that Maxwell argues appellate counsel should have raised were without merit. As such, appellate counsel's decision to not pursue those claims did not fall below an objective standard of reasonableness. Further, Maxwell was not prejudiced by appellate counsel's failure to pursue those claims. Even if appellate counsel had raised them, his efforts would have been unsuccessful and would not have affected the disposition of Maxwell's convictions. Therefore, Maxwell's claim of ineffective assistance of appellate counsel fails.

We affirm.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

[34] See *id.* at 186-187.

[35] *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993).